

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
1998 Biennial Regulatory Review -)	CC Docket No. 98-171
Streamlined Contributor Reporting)	
Requirements Associated with Administration)	
of Telecommunications Relay Service, North)	
American Numbering Plan, Local Number)	
Portability, and Universal Service Support)	
Mechanisms)	
)	
Telecommunications Services for Individuals)	CC Docket No. 90-571
with Hearing and Speech Disabilities, and the)	
Americans with Disabilities Act of 1990)	
)	
Administration of the North American)	CC Docket No. 92-237
Numbering Plan and North American)	NSD File No. L-00-72
Numbering Plan Cost Recovery Contribution)	
Factor and Fund Size)	
)	
Number Resource Optimization)	CC Docket No. 99-200
)	
Telephone Number Portability)	CC Docket No. 95-116
)	
Truth-in-Billing and Billing Format)	CC Docket No. 98-170

**EARTHLINK COMMENTS IN OPPOSITION
AND SUPPORT OF PETITIONS FOR RECONSIDERATION**

EarthLink, Inc., by its attorneys, files these comments on the Petitions for
Reconsideration of the Commission's *Report and Order and Second Further Notice of Proposed*

Rulemaking in the above-captioned proceeding.¹ EarthLink strongly supports the Commission's decision to adopt carrier universal service fund ("USF") pass through requirements to promote more fair and accurate carrier cost recovery. EarthLink urges the Commission to reject petitions that seek reconsideration of the pass through limitations contained in the *Report and Order* and, in addition, to prohibit carriers from imposing unreasonable and discriminatory USF-related administrative charges on customers.

DISCUSSION

The *Report and Order* held that carriers may choose to recover their federal universal service contribution obligations through a separate line item on the customers' bill, but only if that cost recovery is, indeed, a "pass through," that is, the charge should not exceed the incremental USF liability of the carrier (the incremental revenues from the customer transaction multiplied by the current USF contribution factor). While customers unfortunately will continue to be stuck paying the carrier's liabilities, the *Report and Order* approach is vastly superior than the prior law because it will increase billing transparency, eliminate fraudulent practices, and decrease confusion for customers. Under the *Report and Order*, carriers are also generally permitted to recover legitimate USF-related administrative costs from customers through other means, including a separate line item administrative charge for recovery of collection and remittance costs.

Some carriers seek reconsideration of aspects of the *Report and Order* addressing the USF pass through charge. Nextel and Verizon Wireless request that the Commission remove the recovery restrictions from CMRS carriers. AT&T requests that carriers be permitted to recover

¹ *In the Matter of Federal-State Joint Board on Universal Service, et al., Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd 24952 (2002) ("*Report and Order*").

uncollectible universal service charges from other customers. SBC suggests that the April 1, 2003 implementation deadline be deferred until the *Further Notice* is completed and that carriers be permitted to average pass through amounts within customer categories. USTA requests that the limitations on the recovery of universal service costs be eliminated and that the Commission clarify that all costs associated with the administration of universal service are legitimate costs. USTA also supports averaging of uncollectible charges and adding that amount to the contribution factor charged to certain categories of customers.

The Commission should maintain the reasonable limits adopted when the carrier chooses to pass through its universal service contribution obligations to its customers. As found in the *Report and Order*, while carriers enjoyed under prior Commission orders a high degree of flexibility to implement a fair and equitable USF pass through,² many carriers squandered that freedom with unreasonable and abusive practices: charging different pass through rates to different classes of customers; charging rates that far exceeded the USF contribution factor; charging fees that were wholly unrelated to the USF costs themselves.³ The Commission has finally taken appropriate steps to address the issue and should maintain the safeguards adopted. Moreover, to the extent that the former USF contribution process had led to peculiar pass through practices of some carriers, the *Report and Order* significantly corrects the process by “eliminating the interval between the accrual and assessment of revenues and allowing carriers to reduce their assessable revenues by an uncollectible percentage.”⁴ It is also noteworthy that the Commission’s actions are fundamentally consistent with the Communications Act: Section

² See, e.g., *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd. 8776, 9199, 9211 (1997).

³ *Report and Order*, ¶¶ 46-50.

⁴ *Id.*, at ¶ 54.

254(d) of the Act imposes the USF contribution obligation *on the carrier, not on its customers*, and the Act demands appropriate Commission action where the unfettered discretion of carriers would lead to unjust and unreasonable carrier practices.⁵

None of the petitions provide any compelling evidence to warrant reconsideration of the Commission's decision. SBC's proposal to defer implementation, for example, until if or when the FCC takes final action on proposals of the *Second Further Notice*⁶ would result in open-ended delay of the much-needed reform of carrier practices that the Commission has correctly deemed inconsistent with the carriers' responsibilities under the Communications Act. There is no need to halt the necessary and important action taken by the *Report and Order* for the entire telecommunications industry and its customers simply because some carriers assert individual difficulties, mechanical billing issues, or time implementation questions. Indeed, in some cases, these parties have yet to present evidence to support their assertions.⁷ However, the proper course would be for individual carriers to seek a fact-specific rule waiver if a particular carrier has a demonstrated implementation difficulty and if it can show the public interest would be better served by the waiver,⁸ and not to request a general delay of the important rulemaking safeguards adopted in the *Report and Order*.

⁵ 47 U.S.C. §§ 254(d), 201(b). *Southwestern Bell v. FCC*, 896 F.2d 1378, 1379-80 (D.C. Cir. 1990) ("The FCC's responsibility under the Communications Act is . . . to ensure that telephone rates are 'just and reasonable,' 47 U.S.C. § 201(b)").

⁶ Petition for Reconsideration of SBC Communications Inc., at 3 (filed Jan. 29, 2003).

⁷ For example, while SBC asserts that its billing systems cannot be upgraded in time to meet the April 1, 2003 implementation deadline, SBC failed to proffer evidentiary support for the assertions, such as tangible evidence or affidavits describing the timing issue in detail.

⁸ For example, carriers claiming to be unable to meet the April 1st deadline should commit to providing customers with refunds, plus costs for the time value of money, for the USF pass through charges that exceed the USF contribution factor rate.

Proposed delays of the deadlines adopted in the *Report and Order* would also be inappropriate because they would merely extend the arbitrary and discriminatory pass through practices of carriers. As the Commission now acknowledges, the prior precedent did not provide sufficient guidance as to what was acceptable, and carriers used this discretion to change the prices of telecommunications services arbitrarily and to allocate costs among customers absent any relation to cost causation. As the Commission points out, the complaint process is not an effective deterrent and would not provide an efficient way to resolve widespread discriminatory practices or excessive USF pass throughs.⁹

Finally, the principles of cost containment and transparency for USF pass through charges adopted in the order would be more effectively implemented if also applied to the “administrative” USF charges sanctioned by the *Report and Order* (§§ 54, 55). EarthLink agrees with the Ad Hoc’s petition to limit a carrier’s administrative charge to no more than one percent of the USF contribution amount,¹⁰ especially since, as Ad Hoc points out, carriers continue to enjoy the revenue derived from “float” of the USF contribution funds that should offset some or all administrative costs.¹¹ Carriers should not be permitted to engage in the same abuses through the “administrative” charges or to foist administrative billing or collections inefficiencies onto their customers.

⁹ *Report and Order*, ¶ 49.

¹⁰ Ad Hoc Telecommunications Users Committee, Petition for Limited Reconsideration (filed Jan. 29, 2003) (“Ad Hoc Petition”). USTA also supports a cap on the recovery for administrative costs. See, USTA Petition for Partial Reconsideration and Clarification at n. 18 (filed Jan. 29, 2003).

¹¹ Ad Hoc Petition at 6.

CONCLUSION

The *Report and Order* reflects the Commission's commitment to all customers of carriers that universal service charges must be reasonable and legitimate. While ISPs like EarthLink, as well as other customers of carriers, ultimately bear the costs of the Commission's universal service programs, it should be beyond dispute that excessive or discriminatory carrier pass through charges in the name of the Commission's programs fail to meet the carrier's duties to charge customers in a just, reasonable, and comprehensible manner. The Commission should maintain these important principles of reasonable cost containment in the pass through process.

Respectfully Submitted,

By: _____/s/_____

Dave Baker
Vice President
Law and Public Policy
EarthLink, Inc.
1375 Peachtree Street, Level A
Atlanta, GA 30309
Telephone: 404-748-6648
Facsimile: 404-287-4905

Mark J. O'Connor
Kenneth R. Boley
LAMPERT & O'CONNOR, P.C.
1750 K Street, N.W., Suite 600
Washington, D.C. 20006
Telephone: 202-887-6230
Facsimile: 202-887-6231
Counsel for EarthLink, Inc.

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Certificate of Service

I, Angelica Brooks, state that copies of the foregoing “EarthLink Comments in Opposition and Support of Petitions for Reconsideration” were delivered by hand or sent by regular mail, this day, February 27, 2003, to the following:

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

William Maher
Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Carol Matthey
Deputy Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Eric Einhorn
Deputy Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Diane Law Hsu
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Jonathan Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

James Blaszak
Levine, Blaszak, Block, & Boothby, LLP
2001 L Street, NW Suite 900
Washington, D.C. 20036

Jeffrey Brueggeman
SBC Communications Inc.
1401 Eye Street, N.W. Suite 1100
Washington, D.C. 20005

Lawrence Katz
Verizon
1515 North Court House Road, Suite 500
Arlington, VA 22201

Angela Brown
BellSouth Corporation
675 W. Peachtree Street, N.E. Suite 4300
Atlanta, GA 30375

Lori Wright
WorldCom, Inc.
1133 19th Street, N.W.
Washington, D.C. 20036

John Scott
Anna Hoskins
Verizon Wireless
1300 Eye Street, N.W. Suite 400 West
Washington, D.C. 20005

Lawrence Sarjeant
Indra Chalk
Michael McMenamin
Robin Tuttle
United States Telecom Association
1401 H Street, N.W. Suite 600
Washington, D.C. 20005

Laura Gallagher
Laura Phillips
Drinker, Biddle & Reath, LLP
1500 K Street, N.W. Suite 1100
Washington, D.C. 20036

Leonard Kennedy
Lawrence Krevor
Garnet Goins
Nextel Communications, Inc.
2001 Edmund Drive
Reston, VA 20191

Mark Rosenblum
Lawrence Lafaro
Judy Sello
AT&T Corp.
One AT&T Way
Room 3A229
Bedminster, NJ 07921

Richard Askoff
National Exchange Carrier Association, Inc.
80 South Jefferson Road
Whippany, New Jersey 07981

/s/

Angelica Brooks